IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-67

PUBLIC UTILITY DISTRICT NO. 1
OF DOUGLAS COUNTY, WASHINGTON;
HOWARD PREY, LLOYD McLEAN, and
MICHAEL DONEEN, Commissioners
thereof,

Appellants,

vs.

BLAINE M. MADDEN and
VIRGINIA C. MADDEN, his wife,

Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

JURISDICTIONAL STATEMENT

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No._____

PUBLIC UTILITY DISTRICT NO. 1
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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

JURISDICTIONAL STATEMENT

Opinion Below

The Memorandum Opinion of the Court of Appeals for the Ninth Circuit is set forth in the Appendix, infra, page A-1. The judgments of the United States District Court for the Eastern District of Washington, Northern Division, are not generally reported and are set

forth in the Appendix, infra, pages A-9 through A-35. The related judgment of the Washington State Supreme Court is set forth in the Appendix A-2 through A-8.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1), this being an Appeal from a final judgment of the United States Court of Appeals for the Ninth Circuit.

The Memorandum Opinion was sent down February 25, 1976, and Petitioners herein filed a Petition for Rehearing. That Petition was denied on April 23, 1976. The Appellants filed a Notice of Appeal to the United States Supreme Court on May 24, 1976, as required by 28 U.S.C. 2101(c). This Jurisdictional Statement is timely filed. *United States vs. Healy*, (1964) 376 U.S. 75, 11 L.Ed.2d 141; *United States v. Adams*, (1966) 383 U.S. 39, 15 L.Ed.2d 572; Moore's Federal Practice, Volume 9, Section 201.03.

Facts

Appellant Public Utility District No. 1 of Douglas County, Washington, a municipal corporation, is duly organized and operating under the laws of the State of Washington, and Howard Prey, Lloyd McLean, and Michael Doneer, are its duly elected Commissioners. Said public utility district is duly licensed by the Federal Power Commission to construct and operate the Wells Hydroelectric Project under Federal Power Commission License No. 2149. The appellant's operation of the Project is controlled by both the License (issued July 12, 1962) and F.P.C. Order No. 313 (issued Dec. 27, 1965 and reported in 18 CFR, Part 2).

Appellant's Project is located at Azwell, Washington, on the Columbia River at River Mile 516. Azwell is approximately fifty (50) miles north of Wenatchee, Washington. The construction of the Project was completed in 1967, and the reservoir behind the Project inundated land in Chelan, Douglas and Okanogan Counties, all in the State of Washington. The reservoir behind Wells Dam extends to the next dam up the river, Chief Joseph Dam, a Federal project operated by the U.S. Army Corps of Engineers and located near Bridgeport, Washington. The tailwater of Wells Dam empties into the reservoir behind Rocky Reach Dam, located just north of Wenatchee, Washington.

The Respondents in this action owned property which was partially inundated by the Wells reservoir. The Respondents' property is south of Brewster, Washington, and abutts the Columbia River. Appellant condemned the property necessary to construct the Wells Hydroelectric Project in fee title, after litigation concerning the authority of the Appellant to do so. See *Chapman v. P.U.D. No. 1 of Douglas County*, 367 F.2d 163 (9th Cir. 1966); *P.U.D. No. 1 of Douglas County v. Clarke Cooper*, 69 Wn. 2d 909, 421 P.2d 1002 (1966). The condemnation actions were filed in the United States District Court for the Eastern District of Washington, Northern Division, and resulted in judgments of that Court vesting fee title in Appellants, said judgment dated March 27, 1967. The condemnation actions were brought in Federal Court pursuant to the Federal Power Act, Section 21; 16 U.S.C.A. Section 814. Copies of the Federal Court judgments are contained in the Appendix, infra, pages A-9 through A-35.

Thereafter, the Respondents herein brought a mandamus action in the Superior Court of the State of Washington in and for Douglas County, seeking a Writ of Mandamus compelling the Commissioners of the pub-

lic utility district to convey back to Respondents perpetual easements pursuant to the law of the State of Washington, namely R.C.W. 54.16.220. The Superior Court entered an Order Granting the Writ of Mandamus, which Order was appealed to the Supreme Court of the State of Washington. The Supreme Court of the State of Washington rejected Appellants' challenge to R.C.W. 54.15.220 and did not even mention Appellants' full faith and credit or unconstitutional taking arguments which were set forth in Appellants' brief.

While the state court litigation was in progress, the Respondents built a private air landing strip on the condemned property (1967). The Appellants obtained an injunction from the United States District Court restraining Respondents from entering on the property and using the air strip (1968). After the Washington Supreme Court affirmed Respondents' right to a perpetual easement (1973), the Respondents returned to the United States District Court and sought to have the injunction removed (1974). Judge Charles L. Powell refused the request, holding the rights be merged in the 1967 Judgment.

The Respondent, Madden, thereupon appealed the granting of that injunction to the United States Court of Appeals for the Ninth Circuit, seeking to have the injunction vacated. The Court of Appeals did remand the earlier decision to the District Court with the instruction to vacate the injunction (1976); however, the Court of Appeals did not discuss the merits of the constitutional questions raised by Appellant, namely that the inconsistent judgments prevent the appellant from compliance with F.P.C. License No. 2149 and Order No. 313.

Constitutional and Statutory Provisions Involved

This case involves Article IV, Section 1 of the

United States Constitution, the Fifth Amendment to the Constitution of the United States, and Revised Code of Washington 54.16.220:

> *ARTICLE IV, SECTION 1.* Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State; and the congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.
>
> *AMENDMENT V* (1791). No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.
>
> *R.C.W.* 54.16.220. Columbia River hydroelectric projects — Grant back of easements to former owners.
>
> Notwithstanding any other provision of law, every public utility district acquiring privately owned lands, real estate or property for reservoir purposes of a hydroelectirc power project dam on the Columbia River, upon acquisition of title to said lands, whether acquired by purchase or condemnation, shall grant back to the former owners of the lands acquired upon their request therefor, whether prior to conveyance of title to the district or within sixty days thereafter, a

perpetual easement appurtenant to the adjoining property for such occupancy and use and improvement of the acquired lands as will not be detrimental to the operation of the hydroelectric project and not be in violation of the required conditions of the district's Federal Power Commission license for the project: Provided, That said former owners shall not thereafter erect any structure or make any extensive physical change thereon except under a permit issued by the public utility district; Provided further, That said easement shall include a provision that any shorelands thereunder shall be open to the public and shall be subject to cancellation upon sixty days notice to the owners by the district that such lands are to be conveyed to another public agency for game or game fish purposes or public recreational use, in which event the owners shall remove any structures they may have erected thereon within a reasonable time without cost to the district. The provisions of this section shall not be applicable with respect to: (1) lands acquired from an owner who does not desire an easement for such occupancy and use; (2) lands acquired from an owner where the entire estate has been acquired; (3) lands acquired for, and reasonably necessary for, project structures (including borrow areas) or for relocation of roads, highways, railroads, other utilities or railroad industrial sites; and (4) lands heretofore acquired or disposed of by sale or lease by a public utility for whatsoever purpose. [Added by Laws 1st Ex.Sess. 1965 Ch. 118 Section 1.].

Questions Presented

Can a state enact a statute which effectively frustrates an Order of the Federal Power Commission, said Order being promulgated to assure availability of adequate recreational development for the general public at hydroelectric projects.

Does a conflict of law exist when the State Supreme Court upholds such a statute after the United States District Court has enjoined Appellant from exercising any rights under the statute?

If so, was it reversible error for the United States Court of Appeals, Ninth Circuit, to fail to confront the constitutional issues raised by the conflict?

The constitutional issues are: (1) Did the Washington Supreme Court and the United States Court of Appeals fail to give full faith and credit to the previous decision of the United States District Court; and (2) did the Washington Supreme Court and the United States District Court of Appeals deprive Appellants of their property without due process of law?

Statement

Appellant, a public utility district organized and existing under the laws of the State of Washington, condemned certain property of the Respondents in the United States District Court for the Eastern District of Washington, Northern Division, pursuant to the Federal Power Act, Section 21; 16 U.S.C.A. Section 814 and was adjudicated an owner in fee, subject only to certain specific enumerated exceptions relating to irrigation rights. After that judgment had been entered in Federal District Court and the Respondents were paid the full compensation adjudicated in that action, the Respondents brought a separate action under R.C.W. 54.16.220 to require the conveyance back of a perpetual easement over the properties condemned in Federal Court.

The Superior Court of the State of Washington in

and for Douglas County granted the Writ of Mandamus. On December 27, 1973, the Supreme Court of the State of Washington affirmed the issuance of the Writ of Mandamus. A Petition for Rehearing was denied on March 4, 1974. The Appellants Petitioned to the United States Supreme Court, however the Petition was denied. Thereafter, Respondents appealed to the Court of Appeals for an order vacating the decision of the United States District Court. That order issued on February 25, 1976, and Appellant's Motion for Rehearing was denied on April 23, 1976.

1. *Proceedings in Federal Court.* Respondent Madden was the owner of certain agricultural property which was acquired by Public Utility District No. 1 of Douglas County, Washington, in condemnation actions filed in the United States District Court for the Eastern District of Washington, Northern Division. Mr. Madden's property was referred to as Wells Tract No. 124.0-B and was condemned by Appellants under Civil Action No. 2784, in the United Sates District Court for the Eastern District of Washington, Northern Division. The condemnation action was settled by stipulation and judgment, Madden and his wife were personally interrogated by the judge, and they agreed to the terms of the condemnation settlement without mentioning any reservations of rights or intention to claim a perpetual easement. A judgment upon that stipulation was entered on March 27, 1967. Copies of the judgments and underlying stipulations are contained herein in the Appendix, infra, pages A-9 to A-35. The stipulation at page A-23 provided in part:

> "That judgment and decree of appropriation may be forthwith made and entered herein in favor of plaintiff and against the defendants condemning, appropriating and vesting fee title in the plaintiff to the respective lands described

> in the Complaints, and all amendments thereto, in each of the above-entitled cases upon the following terms and conditions as to respective cases":

The only reservations made in the respective cases pertained to irrigation rights and did not reserve perpetual easements over the properties condemned.

The judgment, at page A-11 in both cases provided:

> "It is further ordered, adjudged and decreed that upon a payment of the said sums of [a different sum for each judgment] into the registry of the above-entitled Court in this action, the plaintiff, Public Utility District No. 1 of Douglas County, State of Washington, shall be and become the owner *in fee simple* of the lands, real estate premises and appurtenances sought to be appropriated herein and as described in the Complaint, Amendment to Complaint, and Pretrial Order herein, and shall be entitled to enter upon and take possession thereof and to take, hold, own, and at all times thereafter use and possess the same, *subject only to the provisions of the above-mentioned stipulation* and subject to the permanent, exclusive easements to take irrigation water from plaintiff's reservoir as such easements are more particularly described in Exhibit 'A' attached to the Amendment to the Complaint (Emphasis added)."

2. *Attempted Assertion of Hallauer Act Rights.* Pursuant to the provisions of the Hallauer Act, R.C.W. 54.16.220, the Appellee Madden made application to the Appellant Public Utility District No. 1 of Douglas County, Washington, for an easement. Appellant refused to grant an easement. In mid-May, 1967, Madden built an airstrip on the condemned property. The public utility district sought an injunction and the United States District Court, after a hearing on July 23, 1968, permanently enjoined Madden from "enter-

ing upon the lands in which ownership and exclusive right to possession was decreed in the plaintiff by judgment in this court in Civil Action 2784 for any purpose other than as a member of the general public."

3. *State Court Action.* After the Judgment in Condemnation was entered in the United States District Court for the Eastern District of Washington, Northern Division (1967), Respondents commenced an action in the Superior Court of the State of Washington in and for Douglas County, seeking a Writ of Mandamus compelling the Commissioners of the public utility district to convey a perpetual easement appurtenant to their adjoining property over the lands acquired from them by condemnation in the Federal Court Judgments. Appellant sought removal of the mandamus action to the United States District Court for the Eastern District of Washington, Northern Division, on the grounds that Respondents were attempting to collaterally attack the Federal Court Judgment and on the grounds of the unconstitutionality of the State statute. That Petition for Removal was denied. The case went to trial in the Superior Court of the State of Washington in and for Douglas County, and that Court gave judgment for Respondent and issued a Writ of Mandamus requiring Appellant to convey perpetual easements to the Respondents pursuant to the provisions of R.C.W. 54.16.220.

That decision was appealed to the Supreme Court of the State of Washington (1973), assigning procedural errors in the trail, as well as again challenging the constitutionality of R.C.W. 54.16.220 on both State and Federal constitutional grounds. The prime thrust of Appellant's argument throughout this litigation has been that the State Court's action denied full faith and credit to the Federal Court Judgment and allowed a collateral attack upon that Judgment. The Washington State Supreme Court, in affirming the decision, did not even mention, let alone decide, the full faith and credit issue. That omission was argued to the Court in a Petition for Rehearing. The Petition was denied.

4. *Proceedings Subsequent to the Entry of the Supreme Court's Decision.* After the entry of the decision of the Washington State Supreme Court on December 27, 1973, additional arguments were had in the United States District Court for the Eastern District of Washington, Northern Division, on February 25, 1974, Madden moving the Court to remove the earlier injunction. Judge Charles L. Powell denied the motion, holding that Madden's rights under R.C.W. 54.-16.220 were terminated in the judgment of the United States District Court entered on March 27, 1967, as the rights were not explicitly retained, they merged in the federal judgment.

Mr. Madden then appealed to the Ninth Circuit Court of Appeals, requesting that Court to vacate the permanent injunction. The Court of Appeals reversed and remanded with instructions to vacate the injunction. The Appellants herein raised the constitutional issues, particularly the denial of full faith and credit, but the Court of Appeals failed to discuss the merits of said issues.

Full Faith and Credit Denied

Article IV, Section 1 of the United States Constitution states, in part:

> "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; . . .

This clause is one of the provisions incorporated into the Constitution by its framers for the purpose of

transforming an aggregation of independent sovereign states into a nation. The function of the clause was to avoid relitigation in other states of adjudicated issues, while leaving to the law of the forum state the application of predetermined facts to new problems. *Sutton v. Leib*, Ill. (1952) 72 S. Ct. 398, 342 U.S. 402, 96 L. Ed. 448, rehearing denied 72 S. Ct. 674, 343 U.S. 921, 96 L. Ed. 1334.

If in the application of the full faith and credit clause local policy must at times be required to give way, the result is part of the price of our federal system. *Sherrer v. Sherrer*, Mass. (1948) 68 S. Ct. 1087, 1097, 334 U.S. 343, 92 L. Ed. 1429, 1 A.L.R.2d 1355.

Once litigation has been pursued to judgment it shall be as conclusive of the right of the parties in every other Court as in that where the judgment was rendered; therefore a cause of action merged in a judgment in one state is likewise merged in every other state. *Magnolia Petroleum Co. v. Hunt*, La., (1943) 64 S. Ct. 208, 320 U.S. 430, 88 L. Ed. 149, 150 A.L.R. 413, rehearing denied, 64 S. Ct. 483, 321 U.S. 801, 88 L. Ed. 1088.

Full faith and credit under this section must be given to the Courts of territories and possessions of the United States as well as of the state, and must be given to judgments of all federal courts. *Garvin v Garvin*, (1951) 96 N.E.2d 721, 302 N.Y. 96.

How the Federal Questions Were Raised and Decided Below

In the State Court mandamus action, Appellants first petitioned for removal of the action to the United States District Court for the Eastern District of Washington, Northern Division, which had rendered the Judgment in Condemnation. That petition was denied.

Appellant then moved the trial court for an order of summary judgment on the basis of an unconstitutional taking and denial of full faith and credit, among other grounds. Both an original motion and renewed motion were denied. Following a judgment granting the issuance of the Writ of Mandamus, Appellants again raised the same issues on a motion to reconsider and in the alternative fo a new trial. Both motions were denied, and judgment issued.

On appeal to the Supreme Court of the State of Washington, Appellants assigned error to procedural grounds and that "the Court erred in refusing to give full faith and credit to the Federal Court Judgments in Condemnation as required by Article IV, Section 1 of the United States Constitution". The Supreme Court of the State of Washington, in affirming the decision, made no mention of either the unconstitutional taking or the full faith and credit arguments raised by Appellants. A timely petition for rehearing was denied by the Supreme Court on March 4, 1974.

The issue was once again raised before the Court of Appeals for the Ninth Circuit, but said Court failed to mention the problem in its short Memorandum Opinion.

Both the State Courts and the Ninth Circuit Court of Appeals failed to address the constitutional issues; the result is the frustration of the policy of federalism by encouraging forum-shopping and by allowing a state to enact statutes which derogate from federal authority.

The Federal Questions Are Substantial

As construed by the State of Washington's highest Court, R.C.W. 54.16.220 allows a state to defeat Federal condemnation actions in United States District Court for Federal Power Act projects. All that a leg-

islature need do is pass a law requiring anyone acquiring property by "purchase or condemnation" to convey back to the former owners certain property rights "notwithstanding any other provision of law". That decision places the Commissioners of a public utility district operating pursuant to the Federal Power Act and under rules and regulations promulgated by the Federal Power Commission in an untenable position. They are subject to contempt citations by the State Court if they do not give up substantial property rights acquired pursuant to Federal statutes in United States District Court. The capacity of a state to create this dilemma creates a substantial question as to federal-state relations and a substantial federal question under the full faith and credit clause of the United States Constitution and the guarantee of property rights under the Fifth Amendment to the United States Constitution.

Conclusion

For the foregoing reasons, probable jurisdiction of this case should be noted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PUBLIC UTILITY DISTRICT NO. 1 OF DOUGLAS COUNTY WASHINGTON, A Municipal Corporation,
Plaintiff-Appellee,
vs.
BLAINE M. MADDEN and VIRGINIA C. MADDEN, his wife,
Defendants-Appellants.

No. 74-3222

MEMORANDUM FOR PUBLICATION

[February 25, 1976]

On Appeal from the United States District Court for the Eastern District of Washington

Before: BROWNING and HUFSTEDLER, Circuit Judges and THOMPSON,* District Judge

The order denying the Maddens' motion to dissolve the injunction granted by the federal district court is vacated. The cause is remanded to the district court for further proceedings, in which the district court shall give full faith and credit to the judgment of the Washington court, as affirmed by the Supreme Court of Washington. (*State ex rel. Madden v. Public Utility District No.* v, 83 Wash.2d 219, 517 P.2d 585 (1974).)

FOR PUBLICATION

*Honorable Bruce R. Thompson, United States District Judge for the District of Nevada, sitting by designation.

APPENDIX

[No. 42710 En Banc. Dec. 27, 1973

THE STATE OF WASHINGTON, *on the Relation of Blaine M. Madden et al., Respondents*, v. PUBLIC UTILITY DISTRICT NO 1 *et al., Appellants.*

[1] Common Law — Statutes — Conflict With Common-law Rule — Effect. A statute whose terms are so inconsistent with and repugnant to a rule of the common law that both may not simultaneously be given effect is deemed to abrogate the prior common-law rule. In enacting a statute the legislature is deemed to be aware of applicable common-law rules.

[2] Waiver — Elements — Intent To Waive — Necessity. A "waiver" is an intentional relinquishment of a known right; in order to establish a "waiver," the existence of an intent to waive a right must be clearly shown.

[3] Evidence — Rebuttal Evidence — Admissibility — Discretion of Trial Court. The admission of rebuttal evidence is within the discretion of the trial court.

[4] Municipal Corporations — Public Utility Districts — Character — In General. Public utility districts are municipal corporations.

[5] Municipal Corporations — Gift — What Constitutes — Transfer of Right. The transferring of that which one has no power to refuse, by which transfer one merely confirms a right, is not a "gift" for purposes of Const. art. 8, § 7, which forbids municipal corporations from making gifts to private individuals.

Appeal from a judgment of the Superior Court for Douglas County, No. 9585, Felix Rea, J., entered January 26, 1973. *Affirmed.*

Action seeking a writ of mandams to compel the granting of easements. The defendants appeal from granting of the writ.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, on the Relation of BLAINE M. MADDEN and VIRGINIA C. MADDEN, his wife; and GEORGE A. HYMER and CAROLINE HYMER, his wife, *Respondents,*	No. 42710
v.	En Banc
PUBLIC UTILITY DISTRICT NO. 1 OF DOUGLAS COUNTY; HOWARD PREY, LLOYD McLEAN and MICHAEL DONEEN, Commissioners thereof *Appellants.*	Filed Dec. 27, 1973

UTTER, J. — Public Utility District No. 1 of Douglas County and its commissioners appeal from a writ of mandamus compelling them to grant respondents Madden and Hymer perpetual easements. These easements were granted pursuant to RCW 54.16.220 on land acquired by appellants from respondents.

This case presents three issues: (1) whether the trial court properly ruled that a prior common law rule does not prevail over a later statute in derogation of that rule; (2) whether the trial court properly exercised its discretion in excluding testimony of appraisers; and (3) whether article 8, section 7 of the Washington State Constitution prohibits the trial court from granting respondents the easements requested in this case. We hold the trial court acted properly and affirm the entry of the writ of mandamus.

In contemplation of the construction at Azwell, Washington of the Wells Hydroelectric Project, licensed by the Federal Power Commission, appellant public

utility district brought a condemnation action against land owned by respondents. The condemnation action later was settled by stipulation and judgment in United States District Court. The stipulation did not, however, either reserve an easement or mention RCW 54.16.220, hereinafter called the Hallauer Act.[1]

Within 60 days of the acquisition by appellants of the property, respondents requested a perpetual easement over the land conveyed, pursuant to the Hallauer Act. Appellants refused respondents' request, claiming that no perpetual easement was provided for expressly in the stipulation and judgment conveying the land and that, therefore, none was contemplated by the parties.

---

[1]RCW 54.16.220. "Columbia river hydroelectric projects — Grant back of easements to former owners. Notwithstanding any other provision of law, every public utility district acquiring privately owned lands, real estate or property for reservoir purposes of a hydroelectric power project dam on the Columbia river, upon acquisition of title to said lands, whether acquired by purchase or condemnation, shall grant back to the former owners of the lands acquired upon their request therefor, whether prior to conveyance of title to the district or within sixty days thereafter, a perpetual easement appurtenant to the adjoining property for such occupancy and use and improvement of the acquired lands as will not be detrimental to the operation of the hydroelectric project and not be in violation of the required conditions of the district's Federal Power Commission license for the project: *Provided,* that said former owners shall not thereafter erect any structure or make any extensive change thereon except under a permit issued by the public utility district: *Provided further,* That said easement shall include a provision that any shorelands thereunder shall be open to the public, and shall be subject to cancellation upon sixty days notice to the owners by the district that such lands are to be conveyed to another public agency for game or fish purposes or public recreational use, in which event the owners shall remove any structures they may have erected thereon within a reasonable time without cost to the district. The provisions of this section shall not be applicable with respect to: (1) lands acquired from an owner who does not desire an easement for such occupancy and use; (2) lands acquired from an owner where the entire estate has been acquired; (3) lands acquired for, and reasonably necessary for, project structures (including borrow areas) or for relocation of roads, highways, railroads, other utilities or railroad industrial sites; and (4) lands heretofore acquired or disposed of by sale or lease by a public utility district for whatsoever purpose."

It is the appellants' position that the respondents are without power to demand a perpetual easement because no right to such was reserved expressly in the stipulation and judgment by which the property was conveyed. Appellants argue that a fee simple was conveyed to it, that there were no restrictions on the deed allowing for a perpetual easement in the grantor and that, therefore, respondents are without power to require appellants to grant them a perpetual easement. They rely on the common law rule to this effect expressed in *Bartlett v. Bartlett*, 183 Wash. 278, 48 P.2d 560 (1935).

This argument leads to the proposition that, in a contract and deed for the sale of real estate, an earlier rule of common law controls over a later statute in derogation of the common law rule unless the statute is expressly incorporated by reference into the deed. We cannot agree.

There is no vested right in an existing law — common law or statutory — which precludes its change or repeal. *Truax v. Corrigan*, 257 U.S. 312, 66 L. Ed. 254, 42 S. Ct. 124 (1921); *Henry v. McKay*, 164 Wash. 526, 3 P.2d 145 (1931). A statute which is clearly designed as a substitute for the prior common law must be given effect. *United States v. Matthews*, 173 U.S. 381, 43 L. Ed. 738, 19 S. Ct. 413 (1899); *Bolles v. Toledo Trust Co.*, 144 Ohio St. 195, 58 N.E.2d 381 (1944). Where, as here, the provisions of a later statute are so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force, the statute will be deemed to abrogate the common law. *State v. Wilson*, 43 N.H. 415 (1862).

It is a general rule of interpretation to assume that the legislature was aware of the established common law rules applicable to the subject matter of the statute

when it was enacted. *Sullivan v. Ward*, 304 Mass. 614, 24 N.E.2d 672 (1939). In ascertaining the legislative intent in the enactment of a statute, the state of the law prior to its adoption must be given consideration. *Peet v. Mills*, 76 Wash. 437, 136 P. 685 (1913). But where, as here, a statute is plain and unambiguous, is must be construed in conformity to its obvious meaning without regard to the previous state of the common law. *Northridge v. Grenier*, 278 Mass. 438, 180 N.E. 226 (1932).

Appellants also contend the trial court erred in sustaining objection to the testimony of their real estate appraisers, offered as rebuttal to respondents' direct testimony that they never intended a waiver of their rights under the Hallauer Act.

"Waiver" is an intentional relinquishment of a known right, but the existence of an intent to waive that right must clearly appear in order to show a waiver. *O'Connor v. Tesdale*, 34 Wn.2d 259, 209 P.2d 274 (1949). The testimony which the trial court refused to admit, at most, would have demonstrated the true value of land without the grant back of a perpetual easement. It would not have shown respondents' waiver of their right to such access under the Hallauer Act. Admission of rebuttal evidence is within the trial court's discretion. *W. E. Roche Fruit Co. v. Northern Pac. Ry.*, 184 Wash. 695, 52 P.2d 325 (1935). We find no abuse of that discretion.

Appellants next argue that the Hallauer Act violates article 8, section 7 of the Washington State Constitution which forbids a municipal corporation from giving "any . . . property . . . to or in aid of any individual." The appellant public utility district is a municipal corporation. *Roehl v. PUD* v, 43 Wn.2d 214, 261 P.2d 92 (1953). Respondents are clearly "individuals" within the contemplation of article 8, section 7.

We cannot, however, find a gift under the facts of this case. We have previously held the Hallauer Act applies. By its terms appellants did not receive complete control of all the rights in respondents' land until the passage of the time period within which respondents could request a perpetual easement. When that timely request was made, appellants were required to grant the perpetual easement. It was not a gift of something they had the power to refuse, but rather confirmation in respondents of an absolute right they had until the passage of time mentioned in the act. As such, there was no intent to give by the appellants, but simply the confirmation of a right never divested from respondents. The elements of a gift were not present and the constitutional provision does not apply. *In re Estate of Slocum*, 83 Wash. 158, 161, 145, P. 204 (1915); *Oman v. Yates*, 70 Wn.2d 181, 422 P.2d 489 (1967).

The judgment of the trial court is affirmed.

/s/ UTTER, J.

WE CONCUR:

HALE, C. J. STAFFORD, J.
FINLEY, J. WRIGHT, J.
HAMILTON, J. ROSELLINI, J.
HUNTER, J. BRACHTENBACH, J.

IN THE DISTRICT COURT OF THE UNITED STATES

For the Eastern District of Washington, Northern Division

PUBLIC UTILITY DISTRICT NO. 1 OF DOUGLAS COUNTY, WASHINGTON, a municipal corporation, *Plaintiff*,	Civil Action
vs.	
CALVIN L. COOPER and MARYE S. COOPER, his wife; BLAINE M. MADDEN and VIRGINIA C. MADDEN, his wife; et al, *Defendants.*	No. 2784

Judgment Determining Compensation and Decree of Appropriation

The above-entitled action having come on regularly for trial before a jury in the above-entitled court to determine the just compensation to be paid by the plaintiff to the defendants for the property and property rights to be taken in this action as said property and rights are described in the complaint, amendment to the complaint and pre-trial order on file herein; the plaintiff appearing by its attorneys, Richard G. Jeffers, Garfield R. Jeffers and Harold A. Pebbles, and the defendants, Calvin L. Cooper and Marye S. Cooper, his wife, and Blaine M. Madden and Virginia C. Madden, his wife, appearing by their attorneys, Eisenhower & Carlson, by Paul Sinnitt and James F. Henriot, and the other defendants not appearing for trial; the par-

ties individually and acting by and through their respective attorneys having maded in open court and filed herein their written stipulation for the entry of judgment and decree of appropriation in favor of plaintiff as to the lands and premises described in the complaint, amendment to the complaint and pre-trial order herein, and fixing the amount of just compensation therefor; NOW THEREFORE, based upon the aforesaid stipulation which is hereby referred to and incorporated by this reference,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That just compensation be made in money in the sum of $96,500.00 to the defendants, Calvin L. Cooper and Marye S. Cooper, his wife, for the condemnation, taking, appropriation and use by plaintiff of the lands, real estate, premises and other property belonging to them and described in the complaint, amendment to the complaint and pre-trial order in this action, (said lands are also described in Exhibit A attached hereto and made a part hereof), and for all severence damages to the remainder of the lands of said defendants not taken, due to their severance from the lands taken.

2. That just compensation be made in money in the sum of $81,000.00 to the defendants, Blaine M. Madden and Virginia C. Madden, his wife, for the condemnation, taking, appropriation and use by plaintiff of the lands, real estate, premises and other property belonging to them and described in the complaint, amendment to the complaint and pre-trial order in this action, (said lands are described in Exhibit B attached hereto and made a part hereof), and for all severance damages to the remainder of the lands of said defendants not taken, due to their severance from the land taken.

IT IS FURTHER ORERED, ADJUDGED AND DECREED that upon payment of the said sums of $96,500.00 and $81,000.00 into the registry of the above-entitled court in this action, the plaintiff, Public Utility District No. 1 of Douglas County, State of Washington, shall be and become the owner *in fee simple* of the lands, real estate premises and appurtenances sought to be appropriated herein and as described in the complaint, amendment to the complaint and pre-trial order herein, and shall be entitled to enter upon and take possession thereof and to take, hold, own and at all times thereafter use and possess the same, *subject only* to the provisions of the above-mentioned stipulation and subject to the permanent, exclusive easements to take irrigation water from plaintiff's reservoir as such easements are more particularly described in Exhibit A attached to the amendment to the complaint, except that defendants' easements are to be 75 feet on either side of the center line instead of 37.5 feet as specified in the descriptions contained in said Exhibit A, (said easements are described in Exhibit C attached hereto and made a part hereof), *and that such payment shall be the full and just compensation for the taking*, condemnation and appropriation and use of the aforesaid lands and for any and all severance damages to the remainder of the lands of the said defendants not taken due to their severance from the lands taken. (Emphasis added)

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all of the rights and obligations of the parties as provided for in the settlement stipulation entered into between the parties on March 10, 1967, and filed herein, be and hereby becomes a part of this judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon payment of said award into the

registry of the court in this cause, the Clerk thereof be and she is hereby ordered and directed to satisfy said judgment and to hold said sum of money for distribution, subject to the further order of this court.

DONE IN OPEN COURT this 27th day of March, 1967.

CHARLES L. POWELL, *Judge*

Presented by:

RICHARD G. JEFFERS, GARFIELD
R. JEFFERS & HAROLD A. PEBBLES
By /s/ GARFIELD R, JEFFERS

Approved as to form and notice
of presentation waived:

EISENHOWER & CARLSON
By /s/ JAMES F. HENRIOT
Attorneys for Defendants

ATTEST: A True Copy.
Dorothy E. Moulton, *Clerk*
United States District Court
Eastern District of Washington
By Hallie Layton, *Deputy Clerk*

EXHIBIT "A"

WELLS TRACT NO. 124.0-A

Part of Indian Allotment No. 29 and Government Lot 3, all in Section 21, Township 30 North, Range 24 East of the Willamette Meridian, Okanogan County, Washington, described as follows:

Commencing at the Southwesterly corner of aforesaid Lot 3 and running thence N 25° 00' W along the Westerly boundary for a distance of 460 feet, more or less, to the South boundary of the Great Northern Railway right of way and true point of beginning of this description; thence Northeasterly along aforesaid right of way for a distance of 860 feet; thence S 09° 00' W to the meander line on the right bank of the Columbia River; thence Southwesterly along said meander line for a distance of 1400 feet; thence N 09° 00' E to said South right of way of said Railway; thence Northeasterly along said right of way a distance of 540 feet, more or less, to the true point of beginning. Together with the land between said parcel and the line of ordinary high water of the Columbia River as bounded on the easterly and westerly ends by an extension of the easterly and westerly lines of said parcel.

EXCEPT: Commencing at said Southwesterly corner of aforesaid Lot 3 and running thence N 25° 00' W along the Westerly boundary thereof for a distance of 460 feet, more or less, to said South boundary of said Great Northern Railway right of way; thence Northeasterly along said South boundary for a distance of 357.57 feet to a point on the Project Boundary line of the Wells Hydroelectric Project, and the true point of beginning of this description; thence continuing Northeasterly along said South boundary for a distance of 502.43 feet to the East boundary of the above described parcel; thence S 09° 00' W along said East boundary for a distance of 49.93 feet, to said Project Boundary line; thence

along said Project Boundary line as follows: S 71° 17' 23" W, 30.82 feet; S 63° 55' 14" W, 94.74 feet; S 84° 48' 11" W, 71.29 feet; S 72° 31' 09" W, 116.84 feet; S 81° 43' 37" W, 174.28 feet to the true point of beginning.

EXHIBIT "B"

WELLS TRACT NO. 124.0-B

All that portion of the following described property situated in the County of Okanogan, State of Washington, lying southerly of the right-of-way of the Great Northern Railway Company, to-wit:

Tract 1:

From the point of beginning which is the Easternmost corner of Indian Allotment No. 29 (also known as the Allotment of La-La-Elquie, or Doctor Jim) in Section 21, Township 30 North, Range 24 East of the Willamette Meridian, which point of beginning is also the Easternmost corner of Government Lot 13 of Section 21; run North 25° West along the Easterly boundary of said Indian Allotment No. 29 (which is the Easterly boundary of said Government Lot 13) a distance of 795 feet more or less to the Northerly right-of-way boundary line of State of Washington Primary Highway No. 10 as the same now exists over and across said lands; thence run Westerly along said Northerly right-of-way boundary line to a point in the same in Section 20, Township 30 North, Range 24 East of the Willamette Meridian and distant 2400 feet in a straight line from the beginning of said course; thence run South 25° East to the meander line of the Columbia River; and thence run Easterly along said meander line to the point of beginning. Together with the land between said parcel and the line of ordinary high water of the Columbia River, as bounded on the easterly and westerly ends by an extension of the easterly and westerly lines of said parcel.

Tract 2:

From the point of beginning which is the Easternmost corner of Indian Allotment No. 29 (also known as the Allotment of La-La-Elquie, or Doctor Jim) in Section 21, Township 30 North, Range 24 East of the Willamette Meridian, run North 25° West along the Easterly boundary of said Indian Allotment No. 29 (which is the Easterly boundary of Government Lot 13) a distance of 795 feet more or less to the Northerly right-of-way boundary line of State of Washington Primary Highway No. 10 as the same now exists over and across said land; thence run North 65° 55' East 1132.5 feet along the said Northerly right-of-way boundary line of said Highway more or less (to a point that coincides with the point located as follows: From the Northeast corner of the Southeast quarter of the Northwest quarter run West 115.5 feet and thence South 26° 10' East 1053.8 feet to the center of the Old County Road; thence run South 87° 38' West 121.1 feet and thence South 63° 13' West 459.9 feet along said center line thence run South 26° 10' East 120 feet; more or less to the Northerly right-of-way boundary line of said Primary State Highway No. 10); thence run South 26° 10' East 399.5 feet to the Northerly right-of-way boundary line of the Great Northern Railway Company; thence run North 63° 48' East 202.0 feet along the North side of said Great Northern Railway Company right-of-way; thence run South 26° 10' East 790 feet to the bank of the Columbia River and the meander line thereof; thence run Westerly along said meander line of the right bank of the Columbia River to the point of beginning. Together with the land between said parcel and the line of ordinary high water of the Columbia River, as bounded on the easterly and westerly ends by an extension of the easterly and westerly lines of said parcel.

EXCEPT the following described land, to-wit:

Tract #A

Part of Indian Allotment No. 29 and Government Lot 3, all in Section 21, Township 30 North, Range 24

East of the Willamette Meridian, Okanogan County, Washington described as follows: Commencing at the southwesterly corner of aforesaid Lot 3 and running thence N 25° 00' W along the westerly boundary for a distance of 460.0 feet more or less to the south boundary of the Great Northern Railway right-of-way and true point of beginning of this description; thence northeasterly along aforesaid right-of-way for a distance of 860.0 feet; thence S 9° 00' W to the meander line on the right bank of the Columbia River; thence southwesterly along said meander line for a distance of 1400.0 feet; thence N 9° 00' E to the south right-of-way of said Railway; thence northeasterly along said right-of-way a distance of 540.0 feet more or less to the true point of beginning.

Tract #B

Part of Government Lot 3 and 4 of Section 21, Township 30 North, Range 24 East of the Willamette Meridian, Okanogan County, Washington, more particularly described as follows: Commencing at the southwesterly corner of aforesaid Lot 3 and running thence N 25° 00' W along the westerly boundary for a distance of 460.0 feet more or less to the south boundary of the Great Northern Railway right-of-way; thence northeasterly along said south boundary of the Great Northern Railway right-of-way for a distance of 860 feet to the east boundary of the above described Tract #"A" and the true point of beginning; thence S 09° 00' W, 49.93 feet along said east boundary of the above described Tract #"A" to the Project Boundary line for the Wells Hydroelectric Project; thence along said Project Boundary line as follows: N 71° 17' 23" E, 136.00 feet; N 68° 35' 41" E, 76.94 feet; N 61° 31' 47" E, 181.79 feet; N 66° 57' 52" E, 120.59 feet; thence leaving said Project Boundary and running N 26° 10' W, 62.68 feet to said south boundary of the Great Northern Railway right-of-way; thence southwesterly along said south boundary of the Great Northern Railway right-of-way for a distance of 484.30 feet to the true point of beginning.

Tract #C

The westerly 450 feet of the following described parcel, to-wit: From the point of beginning which is the Eastermost corner of Indian Allotment No. 29 in Section 21, Township 30 North, Range 24 East of the Willamette Meridian, Okanogan County, Washington, run N 25° 00' W along the easterly boundary of said Indian Allotment No. 29 a distance of 795 feet more or less to the northerly right-of-way boundary line of State of Washington Primary Highway No. 10 as the same now exists over and across said lands; thence run westerly along said right-of-way line to a point in the same in Section 20, a distance of 2400 feet in a straight line from the beginning of said course; thence run S 25° 00' E to the waters of the Columbia River; and thence run easterly along said river to the point of beginning. Excepting therefrom the right-of-way of the State of Washington Primary Highway No. 10 and the right-of-way of the Great Northern Railway Company.

Tract #D

The following described tract to-wit: Part of Government Lot 4, Section 21, Township 30 North, Range 24 East of the Willamette Meridian, Okanogan County, Washington described as follows: Commencing at the southwest corner of aforesaid Lot 3 and running N 25° 00' W along the westerly boundary thereof for a distance of 795 feet more or less to the northerly right-of-way of State of Washington Primary Highway No. 10 as the same now exists; thence run N 65° 55' E along said north boundary for a distance of 1132.5 feet; thence run S 26° 10' E for a distance of 399.5 feet to the northerly right-of-way boundary of the Great Northern Railway; thence N 63° 48' E for a distance of 202.0 feet; thence run S 26° 10' E for a distance of 100.0 feet to the true point of beginning of this description. Continuing S 26° 10' E for a distance of 540 feet; thence S 63° 50' W for a distance of 100.0 feet; thence N 26° 10' W for a distance of 150.0 feet; thence N 63° 50' E for a distance of 90.0 feet; thence N 26° 10' W for a distance of 390.0

feet more or less to the south right-of-way of the aforesaid Railway; thence N 63° 48' E along said right-of-way for a distance of 10.0 feet to the true point of beginning.

Tract #E

Part of Government Lot 12 of Section 20 and Government Lot 13 of Section 21, all in Township 30 North, Range 24 East of the Willamette Meridian, Okanogan County, Washington, described as follows: From the point of beginning which is the Easternmost corner of Indian Allotment No. 29 in Section 21, Township 30 North, Range 24 East of the Willamette Meridian, Okanogan County, Washington, run N 25° 00' W along the easterly boundary of said Indian Allotment No. 29 a distance of 795 feet more or less to the northerly right-of-way boundary line of State of Washington Primary Highway No. 10 as the same now exists over and across said Lands; thence run westerly along said right-of-way line to a point in the same in Section 20, a distance of 2400 feet in a straight line from the beginning on said course; thence run S 25° 00' E to the South boundary of the Great Northern Railway right-of-way; thence N 65° 54' 33" E, along said South boundary for a distance of 450 feet to the TRUE POINT OF BEGINNING of this description; thence continuing N 65° 54' 33" E along said South boundary for a distance of 457.30 feet to the Project Boundary line for the Wells Hydroelectric Project; thence along Project Boundary as follows: S 50° 46' 49" W, 74.24 feet; S 70° 16' 28" W, 166.17 feet; S 63° 19' 08" W, 119.81 feet; S 59° 00' 06" W, 100.28 feet, thence leaving said Project Boundary line and running N 25° 00' W, 24.22 feet to the True Point of Beginning.

It is the intention and understanding of the parties that the properties above described in Exhibits A & B includes lands only below the project boundary.

EXHIBIT "C-1"

TRACT NO. 124.0-A COOPER

Irrigation Water Easement

A strip of land 150 feet in width, 75 feet on each side of center line, over and across Government Lot 3 of Section 21, Township 30 North, Range 24 East of the Willamette Meridian, Okanogan County, Washington, said center line being more particularly described as follows:

Beginning at the Northwest corner of said Section 21 (a found brass cap) from which a Witness Corner on the Northeast boundary of Moses Agreement Indian Allotment No. 29 (a found brass cap) bears N 89°-28'39" E, 21.44 feet; thence S 36°11'09" E, 4035.90 feet to the Project Boundary line for the Wells Hydroelectric Project and the TRUE POINT OF BEGINNING; thence S 09°00' W, 560 feet, more or less, along said center line to the ordinary high water line for the Columbia River and the terminal point of this description, said 150 foot wide strip to be bounded on the North end by said Project Boundary line, and on the South end by said ordinary high water line.

EXHIBIT "C-2"

TRACT NO. 124.0-B BLAINE M. AND VIRGINIA MADDEN

Irrigation Water Easement

A strip of land 150 feet wide, 75 feet on each side of a center line, over and across Government Lots 3 and 4 of Section 21, Township 30 North, Range 24 East of the Willamette Meridian, Okanogan County, Washington, said center line more particularly described as follows:

Beginning at the Northwest corner of said Section 21

(a found brass cap) from which a Witness Corner on the Northeast boundary of Moses Agreement Indian Allotment No. 29 (a found brass cap) bears N 89°-28'39" E, 21.44 feet; thence S 40°40'28" E, 4140.37 feet to the Project Boundary line for the Wells Hydroelectric Project and the TRUE POINT OF BEGINNING; thence S 54°56' E, 790 feet, more or less, along said center line to the ordinary high water line for the Columbia River and the terminal point of this description, said 150 foot wide strip to be bounded on the North end by said Project Boundary line, and on the South end by said ordinary high water line.

EXHIBIT "C-3"

TRACT NO. 124.0-B BLAINE M. AND VIRGINIA MADDEN, ET AL

Irrigation Water Easement

A strip of land 150 feet wide, 75 feet on each side of a center line, over and across Government Lot 13, Section 21, Township 30 North, Range 24 East of the Willamette Meridian, Okanogan County, Washington, said center line more particularly described as follows:

Beginning at the Northwest corner of said Section 21 (a found brass cap) from which a Witness Corner on the Northeast boundary of Moses Agreement Indian Allotment No. 29 (a found brass cap) bears N 89°-28'39" E, 21.44 feet; thence S 10°12'16" E, 3755.71 feet to the Southerly right of way line of the Great Northern Railway and the Project Boundary line for the Wells Hydroelectric Project, said point also being the TRUE POINT OF BEGINNING for this description; thence S 24°51'37" E, 260 feet, more or less, along said center line to the ordinary high water line of the Columbia River and the terminal point of this description, said 150 foot wide strip to be bounded on the North end by said Project Boundary line, and on the South end by said ordinary high water line.

IN THE DISTRICT COURT OF THE UNITED STATES

For the Eastern District of Washington, Northern Division

PUBLIC UTILITY DISTRICT NO. 1 OF DOUGLAS COUNTY, WASHINGTON, a municipal corporation, *Plaintiff*, *vs.* A CERTAIN TRACT OF LAND LOCATED IN OKANOGAN COUNTY, STATE OF WASHINTON; GEORGE A HYMER and CAROLINE HYMER, his wife; COMMERCIAL BANK OF TWISP; GEORGE E. MAAS and STELLA J. MAAS, his wife; and UNKNOWN OWNERS, *Defendants.*	Civil Action No. 2724 STIPULATION

PUBLIC UTILITY DISTRICT NO. 1 OF DOUGLAS COUNTY, WASHINGTON, a municipal corporation, *Plaintiff*, *vs.* A CERTAIN TRACT OF LAND LOCATED IN OKANOGAN COUNTY, STATE OF WASHINGTON; J. L. COOPER, a/k/a J. LEE COOPER, and GERTRUDE COOPER, his wife; ELMER H. CRAIG and ALPHA CRAIG, his wife; and UNKNOWN OWNERS, *Defendants.*	Civil Action No. 2777 STIPULATION

PUBLIC UTILITY DISTRICT NO. 1 OF DOUGLAS COUNTY, WASHINGTON a municipal corporation, *Plaintiff,* *vs.* CALVIN L. COOPER and MARYE S. COOPER, his wife; BLAINE M. MADDEN and VIRGINIA C. MADDEN, his wife, et al, *Defendants.*	Civil Action No. 2784	STIPULATION
PUBLIC UTILITY DISTRICT NO. 1 OF DOUGLAS COUNTY, WASHINGTON a municipal corporation, *Plaintiff,* *vs.* A CERTAIN TRACT OF LAND LOCATED IN OKANOGAN COUNTY, STATE OF WASHINGTON; JOHN EDWARD NEFF, a/k/a JOHN E. NEFF, a/k/a JOHN NEFF, and AMY L. NEFF, his wife; BLAINE M. MADDEN and VIRGINIA C. MADDEN, his wife; CALVIN L. COOPER and MARYE COOPER, his wife; and UNKNOWN OWNERS, *Defendants.*	Civil Action No. 2836	STIPULATION

TITLES OF THE FOUR CASES

It is hereby stipulated by and between Hughes and Jeffers and Harold A. Pebbles, acting as attorneys for the Public Utility District No. 1 of Douglas County, plaintiff in the above entitled actions; and the defendants in the above entitled actions, acting by and through

Eisenhower and Carlson, and Paul Senett, of counsel as follows:

(1) That judgment and decree of appropriation may be forthwith made and entered herein in favor of plaintiff and against the defendants, condemning, appropriating and vesting fee title in plaintiff to the respective lands described in the complaints and all amendments thereto in each of the above entitled cases upon the following terms and conditions as to the respective cases:

PUD vs. J. LEE COOPER

A(1) Just compensation is $192,000.

A(2) Petitioner is entitled to a credit on the judgment in this matter pursuant to that certain stipulation entered into on the 28th of January, 1966, in the amount of $30,000

A(3) In connection with the said stipulation defendants are entitled to interest at the rate of 4½% per year on $162,000 from January 28, 1966, to November 1, 1966, and 6% interest on the $162,000 from November 1, 1966 to March 15, 1967

A(4) Defendants are entitled to remove all improvements from the property being taken, providing that the defendants have until April 10, 1967 to remove the dwelling.

A(5) Plaintiff stipulates that no borrow shall be removed from the property being acquired above contour line 775.

A(6) With reference to the trees below contour line 781.5 defendant shall immediately mark with a red flag those trees which he desires to remove,

and it will be his responsibility to remove them immediately and prior to Apr. 1, 1967.

A(7) Any of the improvements, consisting of cabins or the dwelling which defendant does not desire to remove, he shall inform the PUD by April 1. It will be the plaintiff's obligation to remove, however the defendant will have the right to occupy the house until April 10th if he desires not to remove the same.

A(8) With respect to those trees above Contour Line 781.5 to 784, the defendant is granted the right to continue the operation of the fruit trees until such time as the PUD under its general project policy, requires the removal of the trees up to the FPC clearing line. There is reserved to the defendant the right to remove the trees whenever he so desires. From 784 to the project boundary the defendant is granted the right to continue growing trees and operating the orchard as long as said operation is not inconsistent to the purposes for which the property is acquired by the plaintiff herein. All trees are the responsibility of the land owner, and the District is relieved from any liability in connection therewith.

A(9) Defendant shall be entitled to those certain easements for passageway and to obtain water from the reservoir pool set forth in the pretrial order on file herein. The easement for water will be at the location to be specified by Mr. Cooper, and as set forth in the pretrial order.

MADDEN TITLE

B(1) Just compensation shall be $81,000.

B(2) No borrow shall be removed above contour elevation 775.

B(3) With respect to those trees above Contour Line 781.5 to 784, the defendant is granted the right to continue the operation of the fruit trees until such time as the PUD under its general project policy requires the removal of the trees up to the FPC clearing line, there is reserved to the defendant the right to remove the trees whenever he so desires. From 784 to the project boundary the defendant is granted the right to continue growing trees and operating the orchard as long as the said operation is not inconsistent to the purposes for which the property is acquired by the plaintiff herein. All trees are the responsibility of the land owner, and the District is relieved from any liability in connection therewith.

B(4) There is reserved to the defendant those certain easements across the property being acquired for the purpose of withdrawing waters from the reservoir as set forth in the pretrial order herein, which provision shall be contained in the judgment, also an easement for a service road to irrigation lines, the description for which will be provided in the decree.

B(5) Plaintiff shall replace that certain river pump and pipe which is presently being utilized to irrigate portions of the Blaine Madden, Calvin Cooper and J. L. Cooper remaining properties at a location to be designated by J. L. Cooper and Calvin Cooper and Blaine Madden, at the expense of the plaintiff; such installation is to be by the Reed Pump and Supply Company; that the plaintiff will reimburse the Coopers and the Maddens for such charges, which includes the hookup to the existing system serving their remaining properties above the railroad.

B(6) That the existing system is to remain in operation by the Coopers and the Maddens until the new system is in operation;

B(7) That the plaintiff will provide a new well for the defendant Madden, at plaintiff's expense, having a capacity of 100 Gallons per minute, and which shall be potable water; that the plaintiff shall provide electrical wiring and a 7½ horsepower motor pump and casing ready for operation; that Reed Pump and Supply shall do the work excepting for the well drilling, which shall be done by a well driller; that the said well is to be located on the property of the defendant above the project boundary line and below the railroad right-of-way. There is reserved to the defendant the right to remove the irrigation pipe and risers on the property being acquired herein; The said well also may be located directly across the railroad at a location within the area to be determined by Keith Anderson, geologist and the well driller, giving every reasonable consideration to the defendant as to the location.

B(8) If potable water cannot be supplied at the rate of 100 gallons per minute, plaintiff will be responsible in damages for such failure.

B(9) The aforesaid domestic well shall be tested and approved by the Reed Pump and Supply, and the plaintiff shall be responsible for the capacity of potable water in the well for a period of five years, except for acts of God or conditions created by the landowner which caused contamination.

B(10) With respect to the system for withdrawing water from the reservoir, the District agrees to indemnify and hold harmless the second party for any and all injury or damage to the re-established pumping facilities, well casing, filtration and irrigation systems re-

sulting from the stagnation or slowing of water current in the Columbia River, or from settling or sinking of the fill material or subsoil upon which the re-established pump shall be situated for a period of five years from the completion of the construction of the relocated system.

B(11) There is reserved to the defendant the right to remove any trees below elevation 781.5 providing said trees are removed within ten days from this date.

CALVIN COOPER, same title, same number

C(1) Compensation shall be in the sum of $96,500.

C(2) No borrow shall be removed above contour elevation 775.

C(3) With respect to those trees above Contour Line 781.5 to 784, the defendant is granted the right to continue the operation of the fruit trees until such time as the PUD under its general project policy requires the removal of the trees up to the FPC clearing line. From elevation 784 to the project boundary the defendant is granted the right to continue growing trees and operating the orchard as long as the said operation is not inconsistent to the purposes for which the property is acquired by the plaintiff herein. All trees are the responsibility of the land owner, and the District is relieved from any liability in connection therewith.

C(4) There is reserved to the defendant that certain easement across the property being acquired for the purpose of withdrawing waters from the reservoir as set forth in the pretrial order herein, which provision shall be contained in the judgment. Also an ease-

ment for a service road to irrigation lines, description for which to be provided in decree.

C(5) Plaintiff shall replace that certain river pump and pipe which is presently being utilized to irrigate portions of the Blaine Madden, Calvin Cooper and the J. L. Cooper remaining properties at a location to be designated by J. L. Cooper and Calvin Cooper and Blaine Madden, at the expense of the plaintiff; that the installation is to be by the Reed Pump and Supply Company; that the plaintiff will reimburse the Coopers and the Maddens for the charges, which includes the hookup to the existing system serving their remaining properties above the railroad.

C(6) That the existing system is to remain in operation by the Coopers and the Maddens until the new system is in operation;

C(7) That the plaintiff at its expense will provide a new well for the defendant Cooper, having a capacity of 100 Gallons per minute, and which shall be potable water; that the plaintiff shall provide electrical wiring and a 7½ horsepower motor pump and casing ready for operation; that Reed Pump and Supply shall do the work excepting for the well drilling, which shall be done by a well driller; that the said well is to be located on the property of the defendant above the project boundary line and below the railroad right-of-way, or within 200 yards of the well to be furnished by the plaintiff for Blaine Madden. There is reserved to the defendant the right to remove the irrigation pipe and risers on the property being acquired herein; the said well may also be located directly across the railroad at a location within the area to be determined by Keith Anderson, Geologist and the well driller, giving every reasonable consideration to the defendant as to the location.

C(8) If potable water cannot be supplied at the rate of 100 gallons per minute, plaintiff will be responsible in damages for such failure.

C(9) The aforesaid domestic well shall be tested and approved by the Reed Pump and Supply, and the plaintiff shall be responsible for the capacity of potable water in the well for a period of five years, except for acts of God or conditions created by the land owner which caused contamination.

C(10) With respect to the system for withdrawing water from the reservoir, the District agrees to indemnify and hold harmless the second party for any and all injury or damage to the re-established pumping facilities, well casing, filtration and irrigation systems resulting from the stagnation or slowing of water current in the Columbia River, or from settling or sinking of the fill material or subsoil upon which the reestablished pump shall be situated for a period of five years from the completion of the construction of the relocated system.

C(11) There is reserved to the defendant the right to remove any trees below elevation 781.5 providing said trees are removed within ten days from this date.

C(12) With respect to those certain trees designated as Special Tydeman Spur tree and Original Winesap Spur tree located between 781.5 and 784.2, the defendant shall mark those trees with special markings, and is granted the right to care, cultivate, propagate and harvest said trees until such time as the Federal Power Commission shall order the District to remove the said trees, and all at his own risk and without liability to the District. The defendant Calvin Cooper is accorded the same rights to grow trees and maintain orchard as accorded defendant Madden as above specified herein.

D(1) Just compensation shall be $68,000, of which $54,000 is for the property being acquired in damages and $14,000 for the los of the water system.

D(2) There is reserved to the defendant the right to remove all improvements in the area acquired, providing they are removed by April 10, 1967, except for the pumping facilities and pipeline which shall be salvaged by Hymer prior to April 27, 1967.

D(3) It is further agreed that there shall be no clearing or disturbance within a radius of 50 feet of the existing well until April 27, 1967, providing further that within such 50 foot radius the defendant agrees to be responsible for clearing the property which shall be done on or before April 27, 1967.

D(4) No borrow shall be removed above contour elevation 775.

D(5) With respect to those trees above Contour Line 781.5 to 784 the defendant is granted the right to continue the operation of the fruit trees until such time as the PUD under its general project policy requires the removal of the trees up to the FPC clearing line. From 784 to the project boundary the defendant is granted the right to continue growing trees and operating the orchard as long as the said operation is not inconsistent to the purpose for which the property is acquired by the plaintiff herein. All trees are the responsibility of the landowner and the District is relieved from any liability in connection therewith.

D(6) As to the defendants George Hymer and wife the real property to be taken by plaintiff herein shall be that described in the amended complaint and the

amendment to the amended complaint and the exhibits attached to such pleadings.

D(7) Defendant shall be entitled to that certain easement to obtain water from the reservoir pool set forth in the pretrial order on file herein.

Defendant shall have until April 10th to remove those trees which he will remove.

JOHN E. NEFF 2836

E(1) Just compensation is $10,000.00

E(2) The district will reimburse John E. Neff for the costs of $21,163.50 incurred to Reed Pump and Supply for the rehabilitation or the reinstallation of his existing water system.

E(3) There will be no interruption of irrigation services to defendant Neff's remaining land.

E(4) Defendant Neff shall be granted that certain easement or easements set forth in the pretrial order on file herein.

E(5) The District agrees to indemnify and hold harmless the second party for any and all injury or damage to the re-established pumping facilities, well casing, filtration and irrigation systems resulting from the stagnation or slowing of water current in the Columbia River, or from settling or sinking of the fill material or subsoil upon which the re-established pump shall be situated for a period of five years from the completion of the construction of the relocated system.

E(6) Plaintiff agrees to hold the landowner harmless from any liability by reason of any construction

either in connection with the rehabilitation of the pumping system or the Great Northern rip-rap.

E(7) The District agrees to hold the landowner harmless from any responsibility for a period of one year to the Washington Highway Department by reason of a certain bond filed by him in connection with the installation of a water line under the right-of-way.

E(8) The defendant shall have the right to salvage the existing 8-inch pipeline and valves.

It is further agreed that in the case entitled Public Utility District No. 1 of Douglas County, Washington, a municipal corporation, petitioner versus John F. Neff, Blaine M. Madden and Virginia C. Madden, Calvin L. Cooper and Marye Cooper, his wife, No. 16967 in the Superior Court of the State of Washington in and for the County of Okanogan, plaintiff will pay just compensation in the amount of $10,000.

It is further stipulated that the cases pending in the following Superior Courts of Okanogan and Douglas Counties shall be disposed of upon the following terms and conditions: Payments of just compensation to the respective individuals hereinafter named in the amounts hereinafter set forth opposite each name.

Okanogan County —

PUD vs. Clark Lee Cooper et al, Cause No. 16897

PUD vs. Ronald H. Morris et al, Cause No. 16839

PUD vs. Alvin Edwin Hymer, Cause No. 16911

PUD vs. John F. Neff, Cause No. 16967

Douglas County —

PUD vs. Ray Anders

PUD vs. Frank John Willis

Names	*Amounts*
Virginia Madden	$3000
Charles John Emerson	800
Alvin Hymer	800
Lary Hymer	1600
Ray Anders	1600
Ray Anders	400
Frank John Willis	400
Clarke Lee Cooper, a minor	400
Claire Lee Cooper	400
Randal Cooper and Sally Cooper	400
Robert Edwards and Joyce W. Edwards	400
Paul Skelly and Sarah Skelly	400
John Emerson and JoAnn Emerson	400
Donald Anderson and Iris Anderson	400
Malcolm Blackhall and Bonita Blackhall	400
Doris Hodgen	400
Blaine Hodgen	400
George Anderson	400
Barbara Anderson	400
Theodore Madden and Edith Madden	400
Teresa Madden, a minor	400
David Martin Madden, a minor	400
Paul Cooper Madden, a minor	400
Rebecca Ann Madden, a minor	400
Phillip Blaine Madden, a minor	400

Earl M. Marsh and Mary L. Marsh, his wife, $2500.00, and in addition to said amount as just compensation payable to the said Earl F. March, wife of Plaintiff (sic) plaintiffs agree to immediately provide

access to permit Mr. Marsh to remove the building and trailer located on his property; and there is reserved to Earl F. Marsh the said building and trailer as salvage, and it is further agreed that the defendant is to have seven days to remove the building and trailer subsequent to the completion of the access road to remove the said building and trailer to the abutting city street.

It is further stipulated with respect to the above referenced federal and superior court cases, and the cases on appeal to the Supreme Court, that the plaintiff and the defendants will bear their own costs and waive all statutory costs as against the other.

As to the aforesaid Superior Court cases, plaintiff shall have judgment and decree of appropriation as to all of the properties described in the complaints in said cases.

Upon the signing of this stipulation plaintiff shall have immediate right of possession, entry and use of all of the real property described in the complaints and amendments thereto in all of the cases above mentioned subject only to the conditions specified herein.

IN WITNESS WHEREOF:

/s/ J. LEE COOPER
/s/ BLAINE M. MADDEN
/s/ CALVIN L. COOPER
/s/ GEORGE A. HYMER
/s/ JOHN E. NEFF
/s/ JOHN F. NEFF

HUGHES & JEFFERS
Attorneys for Plaintiff

/s/ HAROLD A. PEBBLES
/s/ GARFIELD R. JEFFERS

EISENHOWER & CARLSON
Attorneys for Defendants
/s/ By PAUL SINNITT

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, *Chairman*; Charles R. Ross, David S. Black, and Carl E. Bagge.

Recreational Development at Licensed Projects) Docket No. R-294

ORDER NO. 313

Issuing Statement of General Policy

(18 CFR, Part 2)

(Issued December 27, 1965)

This order sets forth a statement of Commission Policy with respect to outdoor recreational development at projects licensed or to be licensed under the Federal Power Act.

There has been a dramatic increase in public utilization of outdoor recreation opportunity during the twenty years since World War II. During the period from 1952 to 1962, for example, visits to National Parks increased 87 percent, visits to other Federal recreation areas increased 238 percent, and visits to State parks increased 113 percent.

The population of the United States has increased substantially in the past two decades, with greater growth predicted for the future. A larger number of Americans than ever before are participating in one form or another of outdoor recreation at established recreation areas. Reservoirs at Federally licensed projects currently provide a significant source of outdoor recreation opportunity; but there is every indica-

tion that greatly expanded recreational development at such sites is possible both at existing projects and at those to be licensed in the future.

The Congress, in enacting Public Law 88-29, recognizing future recreational needs of the nation, set forth the following national policy on outdoor recreation:

> * * * the Congress finds and declares it to be desirable that all American people of present and future generations be assured adequate outdoor recreation resources, and that it is desirable for all levels of government and private interests to take prompt and coordinated action, to the extent practicable without diminishing or affecting their respective powers and functions, to conserve, develop, and utilize such resources for the benefit and enjoyment of the American people.

The President, by Executive Order 11017, dated April 27, 1962, established the Recreation Advisory Council to provide broad policy advice to the heads of federal agencies on all important matters affecting outdoor recreation resources and to facilitate coordinated efforts among federal agencies.

The Federal Power Commission has long been interested in recreational development at licensed projects. While section 10(a) of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063) did not refer specifically to recreation, in 1935 when the Federal Water Power Act was re-enacted as Part I of the Federal Power Act (49 Stat. 838, 16 U.S.C. 791a-825r), the words "including recreational purposes" were added to section 10 (a) to make clear that recreation considerations were to be included in comprehensive development of the nation's water resources . . .

The Commission orders:

(A) Part 2, General Policy and Interpretations, Subchapter A, Chapter I of Title 18 of the Code of Federal Regulations is amended by adding a new § 2.7, entitled "Recreational development at licensed projects," as follows:

§ 2.7 Recreational development at licensed projects.

The Commission will evaluate the recreational resources of all projects under federal license or applications therefor and seek, within its authority, the ultimate development of these resources, consistent with the needs of the area to the extent that such development is not inconsistent with the primary purpose of the project. Reasonable expenditure by a licensee for public recreational development pursuant to an approved plan, including the purchase of land, will be included as part of the project cost. The Commission will not object to licensees and operators of recreational facilities within the boundaries of a project charging reasonable fees to users of such facilities in order to help defray the cost of constructing, operating, and maintaining such facilities.

The Commission expects the licensee to assume the following responsibilities:

(a) *To acquire in fee* and include within the project boundary enough land to assure optimum development of the recreational resources afforded by the project. To the extent consistent with the other objectives of the license, such lands to be acquired in fee for recreational purposes shall include the lands adjacent to the exterior margin of any project reservoir plus all other project lands specified in any approved recrea-

tional use plan for the project. (emphasis added)

(b) To develop suitable public recreational facilities upon project lands and waters and to make provisions for adequate public access to such project facilities and waters. . . .

IN THE SUPREME COURT

OF

THE UNITED STATES

OCTOBER TERM, 1976

No. 76-67

PUBLIC UTILITY DISTRICT NO. 1
OF DOUGLAS COUNTY, WASHINGTON;
HOWARD PREY, LLOYD McLEAN, and
MICHAEL DONEEN, Commissioners
thereof,

Appellants,

vs.

BLAINE M. MADDEN and VIRGINIA C.
MADDEN, husband and wife,

Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

APPELLEES' MOTION TO DISMISS OR AFFIRM

FRANCIS CONKLIN
Attorney at Law
East 12019 Sprague Avenue
Spokane, Washington 99206
(509) 928-1100

Attorney for Appellees

IN THE SUPREME COURT
OF
THE UNITED STATES

OCTOBER TERM, 1976

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Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

APPELLEES' MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves to dismiss or affirm the appeal on the following grounds:

(a) The appeal is not within the Jurisdiction of this Court, because it was not taken in conformity with the rules of this Court;

(b) The question presented is not appealable; and

(c) The question presented is so unsubstantial as not to warrant further argument.

Question Presented

Whether 28 USCA 1738 requires the United States District Court for the Eastern District of Washington to give full faith and credit to the construction, which the Supreme Court of Washington placed upon R.C.W. 54.16.220 in litigation between the same parties?

Counter Statement of the Case

This action commenced as a condemnation proceeding filed by the Plaintiff/Appellant, PUBLIC UTILITY DISTRICT NO. 1 OF DOUGLAS COUNTY, Washington, (hereinafter P.U.D.), to condemn certain property held by the Defendants for the construction of Wells Hydroelectric Project on the Columbia River near Azwell, Washington. The jurisdiction of the United States District Court was invoked pursuant to the Federal Power Act, 16 USCA 814.

The District Court, pursuant to a stipulation signed by all parties, condemned the property and adjudicated the PUBLIC UTILITY DISTRICT owner of the property subject only to certain enumerated exceptions relating to irrigation rights. Both the stipulation and judgment *were silent* about Defendant/Appellee, BLAINE M. MADDEN'S, (hereinafter MADDEN), rights under the Hallauer Act, R.C.W. 54.16.220. Judgment was entered March 27, 1967.

Pursuant to the provisions of the Hallauer Act, R.C.W. 54.16.200, MADDEN made timely application to the P.U.D. for an easement as provided in the aforesaid statute. The P.U.D. refused to grant any easement for any purpose. Subsequently, MADDEN caused a road on the condemned property to be graded and utilized the road for a temporary

airstrip. The P.U.D. sought an injunction and judgment of contempt. The United States District Court, after hearing on July 23, 1968, permanently enjoined MADDEN from "entering upon the lands in which ownership and exclusive right to possession was decreed in the Plaintiff by Judgment in this Court in Civil Action No. 2784 for any purpose other than as a member of the general public."

MADDEN then sought a Writ of Mandamus against the P.U.D. and its Commissioners in the Superior Court of Douglas County seeking enforcement of his rights under the Hallauer Act, R.C.W. 54.16.220. The P.U.D. sought to remove this cause of action to the United States District Court, (Cause No. 3172 EDW). The United States District Court denied the petition for removal and remanded the cause to the Douglas County Superior Court.

The Superior Court for Douglas County then heard the cause on the merits and ordered a Writ of Mandamus issued compelling the P.U.D. to grant MADDEN his rights, pursuant to the express terms of R.C.W. 54.16.220, (Hallauer Act).

The Supreme Court of Washington unanimously affirmed the decision of the Superior Court for Douglas County: *State v. P.U.D.*, 83 Wn. 2d 219 (1973), 517 P.2d 585, appeal dismissed 419 U.S. 808 (1974).

The Supreme Court of Washington held that MADDEN'S rights under R.C.W. 54.16.220 were *preserved* in the Federal condemnation proceeding, unless they were *expressly waived*, in that proceeding. The P.U.D. appealed to this Court, and this Court dismissed the appeal for want of jurisdiction. [419 U.S. 808 (1974)].

MADDEN petitioned the United States District Court *pro se* to dissolve the injunction entered against him July 23, 1968, and the District Court refused to dissolve the injunction. The District Court held that the Supreme Court of Washington had erred, because MADDEN'S rights under R.C.W. 54.16.220 were extinguished in the Federal Condemnation proceeding,

unless *expressly reserved*.

The Ninth Circuit Court of Appeals reversed the District Court in the instant cause. [The Memorandum Opinion of the Ninth Circuit Court of Appeals is attached, Appendix A.]

Argument

A. THE APPEAL IS NOT WITHIN THE JURISDICTION OF THIS COURT, BECAUSE IT WAS NOT TAKEN IN CONFORMITY WITH THE RULES OF THIS COURT.

Rule 10 and Rule 33 of this Court specifically require that service of all pleadings, motions, etc. must be made on *counsel of record*. Appellant, P.U.D., alleges that a Notice of Appeal to the United States Supreme Court was filed in the Court of Appeals on May 24, 1976. Counsel for Appellee, MADDEN, was not and never has been served with a copy of this Notice, as required by Rules 10 and 33, and the Notice of Appeal is therefore incomplete and void. [Affidavit attached, Appendix B.]

B. THE QUESTION PRESENTED IS NOT APPEALABLE.

This Court has no jurisdiction to review on appeal any decisions of a United States Court of Appeals, except as provided in 28 USCA 1254(2). Appellant, P.U.D., by its own statement concedes that the question presented is not appealable under 28 USCA 1254(2).

C. THE QUESTION PRESENTED IS SO UNSUBSTANTIAL AS NOT TO WARRANT FURTHER ARGUMENT.

State ex rel. Madden v. Public Utility District No. 1, 83 Wn.2d 219, 417 P.2d 585 (1974), was appealed to this Court and dismissed for want of jurisdiction. [419 U.S. 808, 42 L.Ed.2d 33, 95 S.Ct. 20.]

The Supreme Court of Washington rejected Appellant, P.U.D.'s, contention that the Legislature of Washington could

not constitutionally modify the common law definition of a fee simple by enacting conservation measures such as the Hallauer Act. [83 Wn.2d 219, 221-222.] The Supreme Court of Washington also held that the Hallauer Act rights are not extinguished in a Federal condemnation proceeding, unless they are *expressly mentioned* in the final decree. This Court denied review of that decision. [419 U.S. 808.]

The United States District Court for the Eastern District of Washington held that it was not bound by that decision, and that the Supreme Court of Washington was in error. The District Court held that unless the rights granted to MADDEN under the Hallauer Act, R.C.W. 54.16.220, were *expressly reserved* in the Federal condemnation proceeding, they were extinguished.

The Ninth Circuit Court of Appeals reversed the District Court, holding that 28 USC 1938 requires the District Court in the same State to give full faith and credit to a decision of the Supreme Court of Washington involving identity of parties and identity of issues.

THIS JUDGMENT SHOULD BE AFFIRMED.

At no time in the United States District Court did the Appellant, P.U.D., urge the issues, which it now seeks to raise on this appeal:

(1) Did the Washington Supreme Court and the United States Court of Appeals fail to give full faith and credit to the previous decision of the United States District Court?

(2) Did the Washington Supreme Court and the United States District, [*(sic)*], Court of Appeals deprive Appellants of their property without due process of law?

These issues were raised for the first time in Appellee's Petition for Reconsideration in the Court of Appeals. Since

these issues were disposed of in the final decision of the Washington Supreme Court, (83 Wn.2d 219, appeal dismissed, 419 U.S. 808), as Appellant admits, further consideration of these issues is barred by settled principles of res judicata.

Moreover, if Appellant's position is based upon Article IV, Section 1, of the United States Constitution, (pp. 11 and 12- Jurisdictional Statement), this reliance is obviously misplaced, because Article IV, Section 1, does not apply to Federal Courts sitting in the same state as the state Court in question. There is no "sister state" involved in this controversy.

Conclusion

FOR THE REASONS Stated above, APPELLEE, MADDEN, respectfully submits this Court has no jurisdiction of the issues; and that Appellant presents no substantial question for further argument in this Court.

WHEREFORE, APPELLEE, MADDEN, respectfully requests that this Court affirm the judgment of the Ninth Circuit Court of Appeals, or in the alternative, that the Appeal be dismissed.

Respectfully submitted,

FRANCIS CONKLIN
Attorney at Law
East 12019 Sprague Avenue
Spokane, Washington 99206
(509) 928-1100

Attorney for Appellee, MADDEN

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PUBLIC UTILITY DISTRICT No. 1 of DOUGLAS COUNTY, WASHINGTON, A Municipal Corporation,	)	
Plaintiff-Appellee,	)	No. 74-3222
vs.	)	MEMORANDUM
BLAINE M. MADDEN and VIRGINIA C. MADDEN, his wife,	)	
Defendants-Appellants.	)	

On Appeal from the United States District Court
for the Eastern District of Washington

Before: BROWNING and HUFSTEDLER, Circuit Judges, and THOMPSON,* District Judge

The Federal District Court's judgment entered on March 27, 1967 is not inconsistent with the Maddens' subsequent assertion in state court of their rights under the Hallauer Act (R.C.W. 54.16.220). The federal judgment effectively conveyed to the District all of the Maddens' then title in the subject land, with the exceptions therein expressly stated. But it did not convey the right that the Hallauer Act gave to the Maddens, by operation of state law, to compel the District to "grant back to the former owners of the lands acquired upon their request therefore . . . within sixty days thereafter [after conveyance of title to the District] a perpetual easement

*Honorable Bruce R. Thompson, United States District Judge for the District of Nevada, sitting by designation.

appurtenant to the adjoining lands and use and improvement of the acquired lands as will not be detrimental to the operation of the hydroelectric project and not be in violation of the required conditons of the District's Federal Power Commission license for the project. . . ." (Hallauer Act, *supra.*)

The subsequent state court decree compelling the P.U.D. to grant back to the Maddens their Hallauer Act easement is final. The judgment was affirmed by the Supreme Court of Washington. (*State ex rel. Madden v. Public Utility District No. 1*, 83 Wn.2d 219, 517 P.2d 585 [1974].) The judgment is entitled to full faith and credit in the Federal District Court. (28 U.S.C. Sec. 1738.)

The District Court erred in refusing to give full faith and credit to the Washington judgment.

The order denying the Maddens' motion to dissolve the injunction granted by the Federal District Court is vacated. The cause is remanded to the District Court for further proceedings, in which the District Court shall give full faith and credit to the judgment of the Washington court, as affirmed by the Supreme Court of Washington (*State ex rel. Madden v. Public Utility District No. 1.*, 83 Wn.2d 219, 517 P.2d 585 (1974).)

APPENDIX B

AFFIDAVIT OF FRANCIS CONKLIN

STATE OF WASHINGTON)
) ss.
COUNTY OF SPOKANE)

FRANCIS CONKLIN, being first duly sworn on oath, deposes and says:

That he is of legal age and competent to testify.

That he was the attorney of record for BLAINE M. MADDEN and VIRGINIA C. MADDEN, husband and wife, in Cause No. 74-3222 in the United States Court of Appeals for the Ninth Circuit.

That no copy of the Notice of Appeal, alleged to have been filed May 24, 1976, in Cause No. 74-3222 in the United States Court of Appeals for the Ninth Circuit, has ever been served on your Affiant.

Further Affiant sayest not.

_____
FRANCIS CONKLIN

On this_____day of September, 1976, personally appeared before me FRANCIS CONKLIN, to me personally known, and swore that the above and foregoing statement is true to the best of his knowledge and belief.

GIVEN under my hand and official seal the date last above written.

_____
NOTARY PUBLIC in and for the
State of Washington, residing in
Spokane.

APPENDIX C

CONSTITUTIONAL PROVISIONS RELIED ON:

United States Constitution, Article IV, Section 1, in part:

"Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; . . ."

STATUTORY PROVISIONS RELIED ON:

28 USC 1738, State and Territorial statues and judicial proceedings; full faith and credit:

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947."

28 USC 1254(2), Courts of appeals; certiorari; appeal; certified questions:

"(2) By appeal by a party relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;"

R.C.W. 54.16.220, the *Hallauer Act*, provides as follows:

"Columbia River Hydroelectro Projects–Grant back of easements to former owners. Notwithstanding any other provision of law, every public utility district acquiring privately owned lands, real estate or property for reservoir purposes of a hydroelectric power project dam on the Columbia River, upon acquisition of title to said lands, whether acquired by purchase or condemnation, shall grant back to the former owners of the lands acquired upon their request therefor, whether prior to conveyance of title to the district or within sixty days thereafter, a perpetual easement appurtenant to the adjoining property for such occupancy and use and improvement of the acquired lands as will not be detrimental to the operation of the hydroelectric project and not be in violation of the required conditions of the district's Federal Power Commission license for the project: *Provided* That said former owners shall not thereafter erect any structure or make any extensive physical change thereon except under a permit issued by the public utility district: *Provided further*, That said easement shall include a provision that any shorelands thereunder shall be open to the public, and shall be subject to cancellation upon sixty days notice to the owners by the district that such lands are to be conveyed to another public agency for game or game fish purposes or public recreational use, in which event the owners shall remove any structures they may have erected thereon within a reasonable time without cost to the district. The provisions of this section shall not be applicable with respect to: (1) lands acquired from an owner who does not desire an easement for such occupancy and use; (2) lands acquired from an owner where the entire estate has been acquired; (3) lands acquired for and reasonably necessary for, project structures (including borrow areas) or for relocation of roads, highways, railroads, other utilities or railroad industrial sites; and (4) lands heretofore acquired or disposed of by sale or lease by a public utility district for whatsoever purpose."

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976
No. 76-67

PUBLIC UTILITY DISTRICT NO. 1
OF DOUGLAS COUNTY, WASHINGTON;
HOWARD PREY, LLOYD McLEAN, and
MICHAEL DONEEN, Commissioners
thereof,

Appellants,

vs.

BLAINE M. MADDEN and
VIRGINIA C. MADDEN, his wife,

Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

Appellants' Response to Appellees' Motion to Dismiss or Affirm

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IN THE SUPREME COURT
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Appellants,

vs.

BLAINE M. MADDEN and VIRGINIA C. MADDEN, his wife,
Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

Appellants' Response to Appellees' Motion to Dismiss or Affirm

Appellant, Public Utility District No. 1 of Douglas County, Washington, pursuant to Rule 16(4) of the Rules of the Supreme Court of the United States, responds to the issues raised in Appellees' Motion to Dismiss or Affirm as follows:

I. In response to Appellees' Paragraph (a), this appeal is within the jurisdiction of the Supreme Court.

(A) The counsel for Appellee complains that he has never been served with a one-page Notice of Appeal. Yet counsel for Appellee did receive a fifty-six page Jurisdictional Statement within the ninety-day time limit for docketing an appeal.

In fact, the Notice of Appeal (a copy of which is affixed hereto as Exhibit A) was served personally on Appellee Blaine M. Madden at his home on May 25, 1976. (Affidavit of Service attached as Exhibit B). This Notice of Appeal was also filed with the Ninth Circuit Court of Appeals and the United States Supreme Court. The Counsel for Appellee does not complain of not receiving actual notice, but asks for dismissal on the basis of an inconsequential, technical flaw.

The Jurisdictional Statement sets forth in great detail the Appellant's case and was actual notice to Appellee's counsel of the pending appeal. To uphold the argument of Appellee that failure to serve counsel with the Notice of Appeal invalidates the appeal, is to acclaim form over substance. While it is true that the Court cannot function without rules, the value of a particular rule must be balanced by the potential injustice if inflexibly enforced. Appellee can show no prejudice or disadvantage resulting from the non-receipt of a Notice of Appeal.

(B) The Court has discussed the issue of procedural irregularities on numerous occasions and has exercised the discretionary power to waive them when actual notice had been timely received by all parties and the substance of the case was presented on its merits. Here the defect was not jurisdictional. See *Johnson v. Florida*, 391 US 596, 20 L Ed 2d 838, 840, 88 S Ct 1713 (1968) citing *Pittsburgh Towing Company v. Mississippi Valley Barge Line Co.*, 385 US 23, 17 L Ed 2d 31, 87 S Ct 195 (1966). The defect was so minor as to be inconsequential and should be waived.

The Supreme Court has allowed a technically defective appeal to be decided on its merits in the recent case of *Johnson v. Florida*, supra. There the Appel-

lant failed to docket an appeal until fifty-six days after the expiration of the sixty-day period provided by the Supreme Court Rule 13(1). The Court passed over the defect, stating in a footnote:

> "The judgment of the Florida Supreme Court from which this appeal is taken was entered October 4, 1967. Appellant's notice of appeal, filed December 30, 1967, was timely under Rule 11(1) of the Rules of this Court. The appeal was not docketed until 56 days after the time provided in Rule 13(1) expired. This defect, however, is not jurisdictional. Pittsburgh Towing Co. v Mississippi Valley Barge Line Co. 385 US 32, 17 L Ed 2d 31, 87 S Ct 195." (20 L Ed 2d 838, 840).

The case cited by the Court, *Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co., supra*, contains an excellent discussion of the Court's attitude toward procedural rules and foreshadows the flexible approach taken in *Johnson v. Florida*. In *Pittsburgh*, the majority states:

> "The motion to dismiss is granted for failure of appellant to comply with the time requirement of Rule 13(1) of the Rules of this Court in docketing its appeal. This appeal was docketed 22 days after expiration of the 60-day period provided by the Rule. During that period, appellant made no application for an enlargement of time, either to the District Court or to a Justice of this Court (see Rule 13(1)), nor did any explanation accompany the untimely docketing of the appeal. The jurisdictional statement itself is silent on the subject. Not until appellee moved to dismiss pursuant to Rule 14(2) did appellant comment upon its default. Its reply to the Motion to Dismiss states that the 'delay was occasioned by a misunderstanding between Counsel for appellants.' It does not elaborate.
>
> "This Court has been generous in excusing

errors of counsel, but if there are to be rules, there must be some limit to our willingness to overlook their violation. While we are inclined to be generous in exercising our discretion to forgive a mistake and waive the consequences of negligence, fairness to other counsel and to parties with business before the Court as well as due regard for our own procedures leads us to believe that this case does not warrant our indulgence."

In the *Pittsburgh* case the defect could have been detrimental to the Appellee and the Appellant failed to explain or comment upon the default. Yet even then Mr. Justice Black dissented, saying:

"Due to a misunderstanding among appellant's lawyers this case was not docketed nor was the record filed until 22 days after the 60-day period prescribed by this Court's Rule 13(1), The Court now, quite contrary to its recent practices, dismisses the case pursuant to Rule 14(2) because of this error of appellant's lawyers. Rule 14(2) permits, but does not require, such a harsh court order to be made. Appellant's counsel, upon reporting the misunderstanding to a member of this Court, could unquestionably have obtained an enlargement of the time to docket the case extending even beyond the 22 days within which the record was actually filed. There is no indication whatever that the appellees, their counsel or other parties with business before this Court have been injured — as the Court seems to intimate without record support — by this slight formalistic delinquency. On the contrary, the appellant is denied review of a judgment setting aside an Interstate Commerce Commission order, a type of three-judge district court judgment from which Congress has seen fit to give aggrieved persons a direct appeal to this Court. Thus, for a mere paper-filing negligence of appellant's counsel, the purpose of Congress to grant reviews of this special

category of administrative orders is frustrated. . . . As I have previously stated, 'The filing of court papers on time is, of course, important in our court system. But lawsuits are not conducted to reward the litigant whose lawyer is most diligent or to punish the litigant whose lawyer is careless. *Procedural paper requirements should never stand as a series of dangerous hazards to the achievement of justice through a fair trial on the merits.*' Beaufort Concrete Co., supra, 384 US at 1006, 16 L Ed 2d at 1019, Black, J., dissenting. The conflict between the interest of the court clerk in the timely filing of papers and the interest of the citizen in having his lawsuit tried should be resolved in favor of the citizen, not the court clerk. I would not dismiss this case for violation of Rule 13(1). (emphasis added).

(C) The failure to serve Appellee's counsel with a one-page Notice of Appeal was more than rectified by timely service of a fifty-six page Jurisdictional Statement. The Supreme Court does have jurisdiction over this litigation and the Appellee's technical argument is without merit.

II. In response to Appellee's Paragraph (b), this Appellant has phrased its appeal according to 28 USC 1254(1) which specifically states:

"By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree,"

The case law clearly sets forth the distinction between an appeal and a writ of certiorari. *City of El Paso v. Simmons*, Tex. 1965, 85 S Ct 577, 379 US 497, 13 L Ed 2d 446, rehearing denied 85 S Ct 879, 380 US 921, 13 L Ed 2d 813.

However, the Supreme Court has on many occasions

determined to treat an appeal improvidently taken as a petition for a writ of certiorari. *City of El Paso v. Simmons, supra; Bradford Electric Light Co., Inc. v. Clapper*, N.H. 1931, 52 S Ct 118, 284 US 221, 76 L Ed 254.

Therefore, although the Appellant has entitled its Jurisdictional Statement, "On Appeal from the United States Court of Appeals, Ninth Circuit," since the Jurisdictional Statute relied upon is 28 USC 1254(1), the Supreme Court may treat the matter as either an appeal or a Petition for a Writ of Certiorari.

III. In response to Appellee's Paragraph (c), this Appellant reasserts that the question presented is indeed substantial and does warrant further argument. The actual question presented by Appellant, as set forth at pages 13 through 14 of the Appellant's Jurisdictional Statement, is, "Does the decision of the Ninth Circuit Court of Appeals allow a state to defeat Federal Condemnation actions in the United States District Court and thereby inpinge on the development of Federal Power Act projects?"

The instant litigation does present a clear example of deprivation of property rights. Yet the question herein presented is not a single isolated occurrence. The viability of Federal Power Act projects will be attacked many times in Washington State and, if other states enact legislation similar to R.C.W. 54.16.220, the long-range affect on power production facilities is clearly to detract from a uniform and coherent federal policy and add to the growth of a multitude of conflicting state regulations.

Energy production is of major importance to our nation. When a state can interfere with a federal energy production program, a major and substantial

question arises. It should be resolved by the highest court of the land.

IV. Appellant requests the Court to examine the conflict apparent in Memorandum Opinion of the Court of Appeals (in Appendix A) and the express language of the Stipulation between the parties in the United States District Court.

> The Court of Appeals erroneously held that: "The federal judgment effectively conveyed to the District all of the Maddens' then title in the subject land, with the exceptions therein expressly stated. But it did not convey the right that the Hallauer Act gave to the Maddens, by operation of state law, . . ."

However, this decision is not supported by logic or evidence. In fact, the United States District Court judgment clearly reveals that the Appellee Madden was to retain only those rights expressly reserved in the Stipulation.

The Stipulation is recorded at pages A-24 through A-27 of the Appellant's Jurisdictional Statement. It contains no mention of Hallauer Act rights. The judgment is recorded at pages A-9 through A-12 of the Appellant's Jurisdictional Statement and at page A-11 it states:

> "Public Utility District No. 1 of Douglas County, State of Washington, shall be and become the owner *in fee simple* of the lands, real estate premises and appurtenances sought to be appropriated herein and as described in the complaint, amendment to the complaint and pretrial order herein, and shall be entitled to enter upon and take possession thereof and to take, hold, own and at all times thereafter use and possess the same *subject only* to the provisions of the above-mentioned stipulation . . ."

Therefore, the Court of Appeals ignores the fact that the United States District Court decreed that all rights not expressly set forth in the Stipulation were merged in the Appellant's fee simple interest. This is the Common Law solution and to hold otherwise is to grant the Appellee a windfall, allowing him to obtain an interest in real property which was paid for by the Appellant.

V. Conclusion

For the reasons stated above, Appellant respectfully submits this Court does have jurisdiction of the issues, that those issues are substantial, that probable jurisdiction of this case should be noted, and the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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Exhibit A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PUBLIC UTILITY DISTRICT NO. 1 OF DOUGLAS COUNTY, WASHINGTON, a municipal corporation, *Plaintiff-Appellee,* *vs.* BLAINE M. MADDEN and VIRGINIA C. MADDEN, his wife, *Defendants-Appellants.*	No. 74-3222 Notice of Appeal to the Supreme Court of the United States of America

NOTICE IS HEREBY GIVEN that the Public Utility District No. 1 of Douglas County, Washington, a municipal corporation, the Plaintiff-Appellee above-named, hereby appeals to the Supreme Court of the United States of America from the final judgment of this Court vacating the decision of the Federal District Court for the Eastern District of Washington, filed herein on February 25, 1976. Plaintiff-Appellee's Petition for Rehearing was denied on April 23, 1976. This appeal is taken pursuant to 28 U.S.C. Section 1254(1).

DATED this 24th day of May, 1976

HUGHES, JEFFERS & DANIELSON
By GARFIELD R. JEFFERS
Attorneys for Plaintiff-Appellee
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Wenatchee, Washington 98801
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Exhibit B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PUBLIC UTILITY DISTRICT NO. 1 OF DOUGLAS COUNTY, WASHINGTON, a municipal corporation, *Plaintiff-Appellee,* *vs.* BLAINE M. MADDEN and VIRGINIA C. MADDEN, his wife, *Defendants-Appellants.*	No. 74-3222 Affidavit of Service

STATE OF WASHINGTON)
) ss.
COUNTY OF _____)

The undersigned, being first duly sworn, on oath deposes and says: That I am and at all times hereinafter mentioned was a citizen of the United States of America and a resident of the State of Washington, over the age of twenty-one years, and competent to be a witness in this action, and not a party thereto.

That on the 25th day of May, 1976, I served copies of Notice of Appeal to the Supreme Court of the United States of America and Request to Clerk to Certify and Transmit Entire Record on Blaine M. Madden, relator and Defendant-Appellant herein, by then and there delivering copies of said Notice of Appeal to the Supreme Court of the United States of America and and Request to Okanogan County Clerk Jackie Bradley to Certify and Transmit Entire Record to said relator and Defendant-Appellant.

s/ CONEY V. FITZHUGH

SUBSCRIBED AND SWORN TO before me this 3rd day of June, 1976.

s/ IONA McFARLAND
NOTARY PUBLIC in and for the State of Washington, residing at Okanogan